Tan Sri Nordin bin Kardi & Anor v Abdul Halim bin Mohamed and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS K-02–92–01 OF 2013 AND K-02–222–01 OF 2013
DAVID WONG, UMI KALTHUM AND PRASAD ABRAHAM JJCA
31 MAY 2016

Contract — Breach — Agreement — Promotion from lecturer to senior lecturer — Whether lecturer fulfilled conditions set by university to be promoted — Whether earlier letter constituted valid contract between employer and employee — Claim for damages due to stress and pressure — Whether university had powers to appoint and promote employees

The respondent ('the plaintiff') was employed by the second appellant ('the second defendant') as a tutor before being appointed and confirmed as a lecturer. The plaintiff then applied to further his postgraduate studies (PhD) where he was to spend a year in the United Kingdom ('the UK') and two years in Malaysia. However, the plaintiff continued his studies for the whole three years in the UK. He returned to teach at the second defendant on 1 June 2006. The registrar of the second defendant issued a letter to the plaintiff stating that the Majlis Eksekutif Universiti ('MEU') had agreed to recommend the plaintiff to be promoted to senior lecturer (DS52) subject to the plaintiff passing the Kriteria Kecemerlangan Akademik and Penilaian Tahap Kecekapan. Via a letter to all faculty deans pertaining the amended criteria for promotions (Circular 2007), the registrar communicated the decision of Lembaga Pengarah Universiti ('LPU') that for promotion from grade DS45 (lecturer) to DS52 (senior lecturer), a candidate who hold a PhD must, inter alia, receive an acknowledgement from Ketua Pusat Tanggungjawab. The plaintiff passed the PTK a year later but the second defendant decided not to promote the plaintiff to the post of senior lecturer (DS52). The plaintiff appealed against the said decision. The second defendant's registrar informed the plaintiff that the MEU decided that the plaintiff should undergo a period of between six months to a year for reassessment. The plaintiff filed an action at the High Court against the defendants for a declaration that: (a) the plaintiff held the position of senior lecturer (DS52) since June 2008; (b) claim for backdated salary and all other dues since June 2008 until the final payment based on the salary scale of a senior lecturer (DS52); (c) tuition fees amounting to RM200,000; and (d) damages due to stress and pressure. The judicial commission ('the JC') allowed the plaintiff's claim in part. Hence, these appeals. The defendants appealed against the whole decision of the JC while the plaintiff appealed against the JC's decision in dismissing his claim for damages and tuition fees.

Held, dismissing the plaintiff's appeal; allowing the defendants' appeal:

(1) The registrar's letter did not in any way form a valid contract between the plaintiff and the defendant. The registrar's letter was merely a letter of notification to the plaintiff on what was required to enable the plaintiff to be promoted to the post of senior lecturer. It is the duty of the second defendant to set guidelines/conditions for its employees for the purpose of promotion in their career. However, these conditions are always subject to variation as the second defendant deems appropriate. Therefore, the issuance of the registrar's letter was merely a notification to the plaintiff of what was required by the second defendant. The plaintiff had passed the PTK a year after the registrar's letter and after the implementation of the new conditions in the 2007 Circular (see para 20).

(2) The second defendant being a university incorporated and established under the Universities and University Colleges Act 1971 ('the UUCA') is strictly governed by the provisions of the UUCA. The second defendant is also subject to the provisions of the Constitution of the Universiti Utara Malaysia ('the UUM Constitution'). Section 6 of the UUM Constitution provides that the second defendant has the powers, inter alia, with regard to academic, administrative and service matters. Under ss 6(1)(p) and (r), the second defendant has the power to appoint and promote employees of the university and the power to regulate conditions of service of the employees of the second defendant including schemes of service, salary scales, leave and discipline. The second defendant had every right to issue the 2007 Circular which, in effect, had amended the registrar's letter by adding another condition for the plaintiff to fulfil before he could be considered to be promoted to the senior lecturer's post. The plaintiff failed to receive a positive acknowledgement from the Ketua Pusat Tanggungjawab. As such, no breach had occurred by the defendants when they failed to promote the plaintiff as senior lecturer (see paras 21 & 26).

(3) Since there was no breach of contract by the defendants, it followed that the plaintiff had no lawful claim against the defendants in damages. It was the findings of fact by the JC that the plaintiff had failed to prove the damages he sought to claim against the defendants and the court did not see any reason to disturb these findings of fact (see para 27).

[Bahasa Malaysia summary

Responden ('plaintif') telah digajikan oleh perayu kedua ('defendan kedua') sebagai tutor sebelum dilantik dan disahkan sebagai pensyarah. Plaintif kemudiannya memohon untuk melanjutkan pengajian lepasan ijazah (PhD) di mana beliau menghabiskan masa setahun di United Kingdom ('UK') dan dua tahun di Malaysia. Walau bagaimanapun, plaintif meneruskan pengajiannya selama tiga tahun di UK. Beliau kembali untuk mengajar di defendan kedua

pada 1 Jun 2006. Pendaftar defendan kedua mengeluarkan surat kepada plaintif menyatakan bahawa Majlis Eksekutif Universiti ('MEU') telah bersetuju untuk mencadangkan plaintif untuk dinaikkan pangkat ke pensyarah kanan (DS52) dengan syarat plaintif lulus Kriteria Kecemerlangan Akademik dan Penilaian Tahap Kecekapan. Melalui surat kepada semua fakulti dekan berkaitan kriteria yang dipinda untuk kenaikan pangkat ('Pekeliling 2007'), Pendaftar menyampaikan keputusan Lembaga Pengarah Universiti ('LPU') bahawa untuk kenaikan pangkat dari gred DS45 (pensyarah) untuk DS52 (pensyarah kanan), calon yang memegang PhD perlu, antara lain, menerima pengiktirafan daripada Ketua Pusat Tanggungjawab. Plaintif lulus PTK setahun kemudian tetapi defendan kedua memutuskan untuk tidak menaikkan pangkat plaintif ke jawatan pensyarah kanan (DS52). Plaintif merayu terhadap keputusan tersebut. Pendaftar defendan kedua memaklumkan plaintif bahawa MEU memutuskan bahawa plaintif perlu menjalani tempoh antara enam bulan hingga setahun untuk penilaian semula. Plaintif memfailkan tindakan di Mahkamah Tinggi terhadap defendan-defendan untuk satu deklarasi bahawa: (a) plaintif memegang jawatan sebagai pensyarah kanan (DS52) sejak Jun 2008; (b) tuntutan gaji 'backdated' dan lain-lain bayaran sejak Jun 2008 sehingga bayaran akhir berdasarkan tangga gaji pensyarah kanan (DS52); (c) yuran pengajian berjumlah RM200,000; dan (d) ganti rugi akibat stress dan tekanan. Pesuruhjaya Kehakiman ('PK') membenarkan sebahagian tuntutan plaintif. Oleh itu, rayuan ini dibuat. Defendan merayu terhadap keseluruhan keputusan PK manakala plaintif merayu terhadap keputusan PK yang telah menolak tuntutannya untuk ganti rugi dan yuran pengajian.

Diputuskan, menolak rayuan plaintif; membenarkan rayuan defendan-defendan:

(1) Surat pendaftar tidak dalam mana-mana cara membentuk kontrak yang sah di antara plaintif dan defendan. Surat pendaftar adalah hanya surat pemberitahuan kepada plaintif tentang apa yang diperlukan untuk membolehkan plaintif untuk dinaikkan pangkat ke jawatan pensyarah kanan. Adalah menjadi tanggungjawab defendan kedua untuk menetapkan garis panduan/syarat-syarat bagi pekerja-pekerjanya untuk tujuan kenaikan pangkat dalam kerjaya mereka. Walau bagaimanapun, syarat-syarat ini sentiasa tertakluk kepada perubahan yang difikirkan sesuai oleh defendan kedua. Oleh itu, pengeluaran surat pendaftar adalah semata-mata satu pemberitahuan kepada plaintif mengenai apa yang diperlukan oleh defendan kedua. Plaintif telah lulus PTK setahun selepas surat pendaftar dan selepas pelaksanaan syarat-syarat baru dalam Pekeliling 2007 (lihat perenggan 20).

(2) Defendan kedua sebagai sebuah universiti yang diperbadankan dan ditubuhkan di bawah Akta Universiti dan Kolej Universiti 1971 ('AUKU') adalah ditadbir dengan ketat oleh peruntukan AUKU.

Defendan kedua juga tertakluk kepada peruntukan-peruntukan Perlembagaan Universiti Utara Malaysia ('Perlembagaan UUM'). Seksyen 6 Perlembagaan UUM memperuntukkan bahawa defendan kedua mempunyai kuasa, antara lain, berhubung hal-hal akademik, pentadbiran dan perkhidmatan. Di bawah ss 6 (1) (p) & (r), defendan kedua mempunyai kuasa untuk melantik dan menaikkan pangkat pekerja Universiti dan kuasa untuk mengawal selia syarat perkhidmatan pekerja defendan kedua termasuk skim perkhidmatan, tangga gaji, cuti dan disiplin. Defendan kedua mempunyai semua hak untuk mengeluarkan Pekeliling 2007 yang, pada hakikatnya, telah meminda surat pendaftar dengan menambah satu lagi syarat untuk plaintif penuhi sebelum dia boleh dipertimbangkan untuk dinaikkan pangkat ke jawatan pensyarah kanan. Plaintif gagal untuk menerima pengakuan positif daripada Ketua Pusat Tanggungjawab. Oleh itu, tiada pelanggaran yang dilakukan oleh defendan apabila mereka gagal untuk menaikkan pangkat plaintif sebagai pensyarah kanan (lihat perenggan 21 & 26).

(3) Memandangkan tiada pelanggaran kontrak oleh defendan-defendan, dengan itu plaintif tidak mempunyai tuntutan sah terhadap defendan-defendan untuk ganti rugi. Dapatan fakta oleh PK adalah bahawa plaintif gagal untuk membuktikan ganti rugi yang dia pohon untuk dituntut terhadap defendan-defendan dan mahkamah tidak mendapati apa-apa alasan untuk mengganggu dapatan-dapatan fakta ini (lihat perenggan 27).]

Notes

For cases on agreement, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3452–3490.

Cases referred to

Coelho v The Public Services Commission [1964] MLJ 12b (refd)
Dr Paramsothy s/o Murugasu v University of Malaya [1983] 1 MLJ 289, FC (refd)
Government Of Malaysia v Rosalind Oh Lee Pek Inn [1973] 1 MLJ 222 (refd)
Kanawagi s/o Seperumaniam v Penang Port Commission [2001] 5 MLJ 433; [2002] 8 CLJ 503, HC (refd)

Legislation referred to

Constitution of the University of Malaya s 45(3)(b)
Constitution of the Universiti Utara Malaysia ss 6, 6(1)(p), (r)

Appeal from: Civil Suit No 22–102 of 2010 (High Court, Alor Setar)

Lim Heng Seng (Amardeep Singh Toor with him) (Lee Hishammuddin Allen & Gledhill) in Civil Appeal No K-02–92–01 of 2013 for the appellants.

Rahmah Bee O Katti Mohd (Rahmah Mohamad & Assoc) in Civil Appeal No K-02–222–01 of 2013 for the appellant.

Rahmah Bee O Katti Mohd (Rahmah Mohamad & Assoc) in Civil Appeal No K-02–92–01 of 2013 for the respondent.

Hashim bin Jahaya (Ismael Alabas & Hashim) in Civil Appeal No K-02–222–01 of 2013 for the respondents.

Umi Kalthum JCA:

[1] The appeal No K-02–92–01 of 2013 is an appeal by the defendants against the decision of the High Court dated 15 December 2012 in allowing the plaintiff's claim for declaration that the plaintiff holds the position of senior lecturer (DS52) since June 2008 and the defendants were ordered to pay the plaintiff backdated salary and all other dues since June 2008 until the final payment based on the salary scale of a senior lecturer (DS52). Whilst the appeal No K-02–222–01 of 2013 is an appeal by the plaintiff against part of the same High Court order in dismissing the plaintiff's claim for exemplary damages, education costs (tuition fees) and damages for stress and pressure suffered by the plaintiff. Both appeals were heard together by us.

[2] Parties will be referred to as they were at the High Court for easy reference. The brief facts of the case are as follows:

(a) the plaintiff commenced employment with the second defendant as a tutor on 3 June 1996 He was then appointed as lecturer on 15 January 1998 and subsequently confirmed in employment as a lecturer on 29 July 1999;

(b) the plaintiff then applied to further his postgraduate studies (PhD) for a period of 1+2 years in University of East Anglia, United Kingdom (UK). He was to spend one year in the UK and the remaining two years in Malaysia. However, while in the UK, the plaintiff applied to continue his postgraduate studies for the whole three years in the UK;

(c) the plaintiff then completed his studies on 26 May 2006 and returned to teach at the second defendant on 1 June 2006;

(d) by a letter dated 22 February 2007 ('registrar's letter'), the registrar of the second defendant issued a letter bearing the subject 'Perakuan Kenaikan Pangkat Dengan Syarat ke Jawatan Pensyarah Kanan DS52' to the plaintiff stating that the Majlis Eksekutif Universiti ('MEU') in its 119th meeting No 01/2007 on 24 January 2007 had agreed to recommend the plaintiff to be promoted to senior lecturer (DS52) subject to the plaintiff achieving a pass in the Kriteria Kecemerlangan Akademik and Penilaian Tahap Kecekapan('PTK');

(e) by a letter dated 31 July 2007 ('2007 Circular') to all Faculty Deans bearing the subject 'Pindaan Kriteria Kenaikan Pangkat ke Jawatan Pensyarah Kanan (DS52), Profesor Madya (DS53) dan Profesor (VK7)', the registrar communicated the decision of the Lembaga Pengarah Universiti('LPU') Bil 03/2007 made on 15 May 2007 pertaining the criteria for promotions. It was stated that, for promotion from grade DS45 (lecturer) to DS52 (senior lecturer) a candidate who holds a PhD must:

(i) be confirmed in employment;

(ii) pass the PTK; and

(iii) receive a *perakuan* from the Ketua Pusat Tanggungjawab.

(f) the plaintiff passed the PTK which he sat from 4 June 2008 to 12 June 2008, a year after the 2007 Circular was issued;

(g) pursuant to the decision of the MEU in its meeting No 11/2008 on 30 November 2008, the second defendant decided not to promote the plaintiff to the post of senior lecture DS52. The plaintiff was accordingly informed of the result by a letter dated 8 January 2009;

(h) by a letter dated 22 January 2009 addressed to the first defendant, the plaintiff appealed against the said decision. The plaintiff had also sent another appeal letter dated 25 February 2009 to the first defendant;

(i) by a letter dated 22 April 2009, the second defendant's registrar (Harun Amin) informed the plaintiff that the MEU had considered the plaintiff's appeal. The MEU had decided that the plaintiff should undergo a period of between six months to one year from the date of the MEU's meeting (22 March 2009) for him to improve his attitude and show positive traits for the MEU to then reassess and decide the matter regarding his promotion;

(j) the second defendant did follow up on its decision to reassess the plaintiff's promotion. By a letter dated 21 April 2010, the *Ketua Penolong Pendaftar Kanan* extended a copy of the 'observation report' prepared by the plaintiff's *Ketua Pusat Tanggungjawab* to the registrar for his further action. At the material time, the MEU had yet to reassess and decide on the plaintiff's promotion to senior lecturer (DS52);

(k) the plaintiff had however in the meantime filed this action against the defendants seeking for the following orders:

(a) Satu Deklarasi oleh Mahkamah Yang Mulia ini yang mengisytiharkan bahawa Plaintif telah memegang jawatan sebagai Pensyarah Kanan (DS52) semenjak Jun 2008 dan juga berhak untuk jawatan Prof Madya (DS54) berkuatkuasa Tiga(3) tahun dari tarikh pengesahan kenaikan pangkat ke jawatan

(DS52) seperti ynag ditetapkan oleh Kriteria Kenaikan Pangkat Defendan Kedua

(b) Defendan Kedua hendaklah membayar tunggakan gaji dan lain-lain bayaran yang berkaitan kepada Plaintif mulai Jun 2008 sehingga sekarang mengikut skala gaji Pensyarah Kanan (DS52) dan apa apa bayaran yang layak Plaintif terima berikutan kenaikan pangkat selanjutnya.

(c) Gantirugi teladan sebanyak RM500,000.00 Sahaja daripada Defendan Pertama.

(d) Pembayaran sebanyak RM200,000.00 Sahaja sebagai kos pengajian ditanggung oleh Plaintif yang perlu dibayar oleh Defendan Kedua kepada Plaintif;

(e) Gantirugi stress atau tekanan yang dihadapi oleh Plaintif daripada tahun 2006 hingga 2010 yang perlu dibayar oleh Defendan Kedua (kepada) (sic) Plaintiff;

(f) Faedah sebanyak 8% setahun sehingga penyelesaian penuh;

(g) Kos.

THE HIGH COURT

[3] On 15 December 2012, the learned judicial commissioner ('the JC') of the High Court (as he then was) allowed the plaintiff's claim in part. Part of prayer (a) and prayer (b) of para 38 was allowed wherein the plaintiff was declared to hold the position of senior lecturer (DS52) since June 2008 only and the defendants were ordered to pay the plaintiff backdated salary under the scale of a senior lecturer DS52 to be calculated from June 2008. The learned JC dismissed part of prayer (a) relating to the plaintiff's claim to be promoted to associate professor and for benefits as an associate professor, prayers (c), (d) and (e) of the same paragraph.

[4] In coming to the decision the learned JC found that the registrar's letter issued by PW6 constituted a valid contract between the plaintiff and the defendants. It was clear from the contents of the registrar's letter that MEU had recommended the plaintiff a promotion to the post of senior lecturer DS52 once the plaintiff fulfilled two conditions, that is, to pass the Kriteria Kecemerlangan Akademik and Penilaian Tahap Kecekapan ('PTK'). The learned JC found the plaintiff had fulfilled both conditions.

[5] The learned JC further found that the defendants were prevented from unilaterally adding further conditions to be fulfilled by the plaintiff for the purpose of promotion after a valid contract had been executed between the plaintiff and the second defendant. Therefore the second defendant's 2007

Circular informing the decision of the Lembaga Pengarah Universiti ('LPU') made on 15 May 2007 pertaining to the criteria for promotions, was not applicable to the plaintiff.

[6] The plaintiff had fulfilled the two conditions stated in the registrar's letter, therefore the plaintiff should be promoted to the post of senior lecturer immediately after the plaintiff had completed the second condition, that is, passing the PTK in June 2008. The second defendant had failed to give reasons as to why the plaintiff was not promoted despite having fulfilled the two conditions and despite several appeals made by the plaintiff.

[7] On exemplary damages, the learned JC found that the plaintiff's claim was vague and the plaintiff had failed to prove that the defendants had caused the plaintiff to suffer any damages or losses. The learned JC also concluded that the plaintiff had failed to prove that it was the first defendant who had made/instigated the second defendant to not promote the plaintiff to the post of senior lecturer or higher. The claim for exemplary damages was therefore dismissed.

[8] On damages due to stress or pressure, the learned JC found that this claim was not proved by any evidence and dismissed it.

[9] On the claim for tuition fees amounting to the sum of RM200,000, the learned JC found that this claim is unsubstantiated. There was no clear description of the money spent by the plaintiff for the period of three years in the University of East Anglia, United Kingdom. As such, the claim under this heading was also dismissed.

[10] Both the plaintiff and the defendants appealed to this court.

THE APPEAL

K-02–92–01 of 2013 appeal

[11] Before us, both the plaintiff's and the defendants' learned counsels agreed to rely on the written submissions filed in this court. We have read the written submissions and concluded that the issue for this court to determine was whether the learned JC had erred in finding that the registrar's letter is a valid contract executed between the plaintiff and the second defendant for the purpose of promotion of the plaintiff to the post of senior lecturer (DS52).

[12] On this point, learned counsel for the defendants submitted that the learned JC had erroneously interpreted the contents of the registrar's letter as a contract between the second defendant and the plaintiff. Proceeding on this

A erroneous basis, the learned JC went on to hold that the second defendant cannot unilaterally vary this purported contract and that the plaintiff was appointed a senior lecturer when he fulfilled the two conditions stipulated in the registrar's letter. The learned JC held that the second defendant cannot unilaterally vary the purported contract in the form of the registrar's letter by
B issuing the 2007 Circular which imposes a third condition, that is, that there should be a recommendation by the Ketua Pusat Tanggungjawab. In the registrar's letter issued in February 2007, the registrar had informed the plaintiff that the MEU had decided to 'memperakukan' the plaintiff to be promoted to senior lecturer (DS52). However, the plaintiff was required to
C fulfill the two conditions. In May 2007, LPU adopted new criteria for staff promotion in their meeting (Bil 03/2007). The registrar then issued the 2007 Circular to all the faculty deans in July 2007 stating for promotions from a lecturer to senior lecturer for PhD holders, the officers are required to fulfill
D three conditions which are; (a) confirmed in employment; (b) pass PTK; and (c) receive a perakuan from the Ketua Pusat Tanggungjawab.

[13] The plaintiff passed the PTK in June 2008. By this time, the 2007 Circular had already taken effect. It was submitted that the learned JC had
E erroneously approached the dispute before him as one to be decided on contractual rights and obligations pertinent to an employer-employee (or master and servant) relationship instead of appointments of officers with a special status in a university under the governing statute. In this regard he erred in determining the case on the premise that the contents of the registrar's letter
F constituted a contract between the second defendant and the plaintiff which cannot be varied by the second defendant by way of its 2007 Circular.

[14] Learned counsel for the defendants submitted that it is trite law that at its most basic formulation, a contract is formed when an offer is made and
G accepted. Mutual assent of the parties is the basis of agreement and this is manifested by one party making an 'offer' to the other and that other responding with an 'acceptance'. The registrar's letter did not contain any words to suggest that the second defendant was making an offer which was subject to acceptance by the plaintiff. What the registrar had stated in her letter
H was that that the MEU had at its 119th meeting No 01/2007 on 24 January 2007 agreed to recommend ('bersetuju untuk memperakukan' (recommend)) the respondent to be promoted to senior lecturer (DS52) subject to him achieving pass in the Kriteria Kecemerlangan Akademik and Penilaian Tahap Kecekapan ('PTK'). Further, the terms used in the registrar's letter are simply
I incapable of any construction pointing towards the formation of a contract. The terms employed therein plainly means that the MEU has agreed to recommend him for promotion subject to his fulfillment of the two conditions. The most that can be made out of these terms are that the second defendant had made an invitation to treat.

[15] In *Coelho v The Public Services Commission* [1964] MLJ 12b the court held that an advertisement calling for applications for jobs is merely an invitation to qualified persons to apply and the resulting applications were offers.

[16] Here, the registrar's letter was merely an invitation to the respondent to make an offer for promotion, subject to him fulfilling the two conditions. As plainly seen above that the plaintiff did not fulfil the two criteria until almost a year after the 2007 Circular was issued. By then, even if the learned JC's contractual approach was the proper one to adopt in this case, the second defendant had already substituted the invitation to treat with a new one which stipulated three conditions for a PhD holder.

[17] Learned counsel for the defendants further submitted that the terms of the registrar's letter also cannot be construed as an affirmative decision that the MEU had in fact confirmed that the plaintiff would be confirmed upon his fulfilment of the two conditions at any time in the indefinite future. The evidence of the registrar herself ('SP6') supported the defendants' contentions above that the registrar's letter had only 'memperakukan' the plaintiff and not 'mengesahkan' him for the promotion subject to him fulfilling the conditions. In the present case, the plaintiff was well aware of the reason he had not been promoted. It was plain that the plaintiff had not been promoted as he had not fulfilled all the criteria in the 2007 Circular. While he had passed the PTK and was confirmed in employment, he had not been recommended (*perakukan*) for the promotion by the Ketua Pusat Tanggungjawab. As such, the reason was clear and the same having been brought out in these proceedings it sufficed and ought to have been taken into account by the learned JC.

[18] More importantly, the defendants added that the appointment of the plaintiff is of a special kind, as once appointed, the plaintiff acquires a special status distinct from that of an employer and employee. His rights and obligations are no longer determined by consent of both parties such as a contractual relationship, but by statute, statutory rules or administrative rules made by the second defendant.

[19] University appointments are not to be viewed as contractual relationships between an employer and employee whose rights and obligations are governed by their contracts of employment. They are appointments of statutory employees who acquire a special status and whose terms are subject to statutory or administrative rules and not by the consent of parties. The plaintiff was an employee appointed by the second defendant and his employment, conditions of service and promotion criteria are governed by such. Several cases were cited to support this proposition.

[20] The plaintiff in reply submitted that the registrar's letter was an offer made by the second defendant to the plaintiff. Based on the terms in the said letter, the plaintiff would automatically be promoted to the post of senior lecturer upon fulfilling the two conditions stipulated. The registrar's letter is a valid contract between the plaintiff and the second defendant. Learned counsel for the plaintiff submitted that the second defendant had taken an unconventional approach in the plaintiff's promotion which was totally opposite the normal procedure. PW6 who was the registrar who had issued the registrar's letter said that the decision of the MEU as stated in the registrar's letter must be complied once the plaintiff fulfilled the two conditions. Further, PW6 in her evidence said that in normal circumstances, any lecturer who has passed the postgraduate studies for PhD will automatically be promoted as senior lecturer.

[21] Learned counsel for the plaintiff further submitted that the terms for promotion as stated in the registrar's letter were supposed to be the final terms. The said registrar's letter should be complied with. It was wrong for the second defendant now to submit that registrar's letter did not bind the second defendant. Learned counsel for the plaintiff submitted that to rely on the 2007 Circular would not bind the plaintiff as the 2007 Circular did not have retrospective effect. Therefore it was wrong for the defendants to rely on the 2007 Circular, which was issued five months after the issuance of the registrar's letter.

[22] We agreed with the submission of learned counsel for the defendants. The registrar's letter did not in any way form a valid contract between the plaintiff and the defendant. The registrar's letter was merely a letter of notification to the plaintiff on what was required to enable the plaintiff to be promoted to the post of senior lecturer. It was the duty of the second defendant to set guidelines/conditions for its employees for the purpose of promotion in their career. However these conditions are always subject to variation as the second defendant deems appropriate. Therefore the issuance of the registrar's letter was merely a notification to the plaintiff of what was required by the second defendant. We noted here that the plaintiff had passed the PTK in June 2008, that was a year after the registrar's letter and after the implementation of the new conditions in the 2007 Circular.

[23] The second defendant being a university incorporated and established under the Universities and University Colleges Act 1971 ('the UUCA'), is strictly governed by the provisions of the UUCA. The second defendant is also subject to the provisions of the Constitution of the Universiti Utara Malaysia (PU(A) 152/1998) ('the UUM Constitution'). Section 6 of the UUM Constitution provides that the second defendant has the powers, inter alia, with regard to academic, administrative and service matters. Under ss 6(1)(p),

(r) the second defendant has the power to appoint and promote employees of the university and the power to regulate the conditions of service of the employees of the second defendant including schemes of service, salary scales, leave and discipline.

[24] The relevant portion of s 6 of the UUM Constitution reads as follows:

> 6(1) The University shall, subject to the provisions of this Constitution, have the following powers:
>
> ...
>
> (p) to appoint and promote employees of the University;
>
> ...
>
> (r) to regulate the conditions of service of the employees of the University, including schemes of service, salary scales, leave and discipline;

[25] *Government Of Malaysia v Rosalind Oh Lee Pek Inn* [1973] 1 MLJ 222, the respondent was a women Police Inspector. While unmarried she was provided rent-free quarters or an allowance in lieu thereof. However, after she married on 20 August 1962 and went to live with her husband, she received neither the rent-free quarters nor an allowance in lieu. She applied for a rent allowance and eventually the government agreed to give her a rent allowance but with effect from 1 March 1965. She brought an action against the government for the housing allowance from the date of her marriage to 28 February 1965 and judgment was given in her favour in the sessions court. The sessions court held that, contrary to the argument of the government, the relationship between the parties is contractual. The Government of Malaysia appealed. Suffian FJ (as he then was) sitting in the High Court at p 224 said:

> Though the plaintiff holds office at the pleasure of the Yang Dipertuan Agung (art 132(2A) of the Federal Constitution) I hold contrary to the arguments on behalf of the government that the relation between her and the Crown are contractual. As was stated by Lord Diplock (p 460) in *Kodeeswaran v A-G of Ceylon* [1970] 2 WLR 456:
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> > It is now well established in British constitutional theory ... that any appointment as a Crown servant, however subordinate, is terminable at will unless it is expressly provided by legislation; but as pointed out by Lord Atkin in *Reilly v Regem* [1933] All ER Rep 179; [1934] AC 176 180, 'a power to determine a contract at will is not inconsistent with existence of a contract until so determined'.
>
> I should add that the contract between a public servant such as the plaintiff and the government is of a very special kind, for as was stated by Ramaswami J at p 1894 when delivering the judgment of the Indian Supreme Court in *Roshan Lal v Union of India* 1967 AIR 1889:
>
> > It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer

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> determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by Government ... The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties.

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The High Court then held that there was nothing in the circular and regulations in that case that entitled the respondent to a housing allowance and therefore her claim should have been dismissed.

[26] In the case of *Kanawagi s/o Seperumaniam v Penang Port Commission* C [2001] 5 MLJ 433 at p 440; [2002] 8 CLJ 503 at p 508 para b, Faiza Tamby Chik J, (as he then was) in applying the principles in *Rosalind Oh*'s case, said:

> Since PPC (Penang Part Commission) is a statutory body and employs its employees under statutory power the contract of employment entered between PPC and its employees was of a special kind and which acquired a special status. D Thereafter the employee's rights and obligations are no longer determined by consent of both parties but by the statute or administrative rules made by the statutory body. This law is the same for government employees, see *Government Of Malaysia v Rosalind Oh Lee Pek Inn* [1973] 1 MLJ 222. Further this statutorily created posts are permanent and pensionable after the probationary period of three E years. The Employees' Provident Fund Act 1951 revised 1982, does not apply to such employees.

[27] In the case of *Dr Paramsothy s/o Murugasu v University of Malaya* [1983] F 1 MLJ 289, the Federal Court dismissed the appellant' appeal and upheld that service circular as valid and not ultra vires the Constitution of the University of Malaya. In that case, the appellant was appointed as a lecturer in the Faculty of Medicine, University of Malaya. the university council in a policy decision passed a resolution requiring all officers in groups A and B who are still on G probation to pass the Peperiksaan Am Kerajaan in addition to any other examination as a prerequisite for confirmation in the posts. The resolution was embodied in aservice circular. The appellant filed a writ seeking a declaration and an injunction to restrain the university from implementing the service circular. The grounds raised were that the said circular is invalid and that it H conflicts with the terms and conditions of his contract of employment and is also in violation of s 45(3)(b) of the Constitution of the University. The learned High Court judge held that the service circular is valid and not ultra vires the Constitution of the University. In dismissing the appeal at p 292, Raja Azlan Shah LP (as he then was) observed that:

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> We therefore hold that the service circular was valid and did not amount to a unilateral variation of the appellant's contract of employment.
>
> The argument that the council's resolution containing a new condition of employment relating to the requirement to pass the Peperiksaan Am Kerajaan must only be implemented by Statute, Act or Regulation and not by a service circular is

in our opinion to confuse form with substance. We see no reason in principle why the council could not implement its resolution by way of a service circular.

[28] From the above cases and the provisions of the UUM Constitution, it was clear to us that the second defendant has the power to regulate the conditions of service its own employees. This power includes the power to amend or vary any rules or requirements as long as it is within the ambit of the second defendant's power's to regulate the conditions of service of its employees. We therefore found that the second defendant had every right to issue the 2007 Circular which in effect had amended the registrar's letter by adding another condition for the plaintiff to fulfill before he could be considered to be promoted to the senior lecturer's post. The plaintiff had failed to fulfill the third condition for promotion to senior lecturer, that is, to receive a positive 'perakuan' from the Ketua Pusat Tanggungjawab. As such, we did not find any breach of contract had occurred by the defendants when they failed to promote the plaintiff as senior lecturer.

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[29] Since we had found there was no breach of contract by the defendants, it followed that the plaintiff had no lawful claim against the defendants in damages. We consequently dismissed the plaintiff's appeal. In any case, it was the findings of fact by the learned JC that the plaintiff had failed to prove the damages he sought to claim against the defendants, and this court did not see any reason to disturb those findings of fact.

CONCLUSION

[30] For the reasons stated above, we unanimously allowed the defendants' appeal (K-02–92–01 of 2013) with costs of RM15,000 here and below. The plaintiff's appeal (K-02–222–01 of 2013) on damages was accordingly dismissed with costs of RM5,000 here only. Deposit was refunded.

Plaintiff's appeal dismissed; defendants' appeal allowed.

Reported by Afiq Mohamad